PUBLIC LAW BOARD NO. 1838

Award No. 40 - 1838

Carrier File MW-RO-78-101

Parties to Dispute: Brotherhood of Maintenance of Way Employees and Norfolk and Western Railway Company

Statement of Claim: This claim is filed for employes listed in Attachment "A", who were furloughed or cut back to lower pay positions account Carrier moved its rail welding work from the rail welding plant at Bellevue, Ohio, in violation of Rules 1 and 2, and Appendix "D". All affected employes be paid an equal proportionate amount of man hours, consumed by the outside forces performing said work.

Findings: The Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated March 1, 1976, that it has jurisdiction of the parties and the subject matter, and that the parties were given due notice of the hearing held.

The instant dispute was initiated by an exchange of the following correspondence. The Union, on May 22, 1978, sent the following:

> "Our attention has been invited to the fact that Carrier has engaged in and is now engaging in permitting employes who are not covered by the scope of our current M/W Agreement to perform the work that is historically, traditionally and exclusively that of Roadway Material Yard employes. Please consider this as a claim that the Carrier has violated the effective M/W Agreement by permitting contractor's employes, who do not pay any union dues or Railroad Retirement and employes at Bellvue, [sic] Ohio to perform this work.
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> The Carrier is permitting contractors and employes at Bellvue, [sic] Ohio to weld rail that has historically, traditionally and exclusively been done at the Roadway Material Yard at Roanoke, Virginia, as far back as 1949. They ran two shifts welding rail in 1958, 1964, 1965, 1966, and as late as 1977.
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> There can be no valid argument set forth by the Carrier that we do not have sufficient men, materials and equipment with sufficient skills and ability to perform

such work. As a matter of fact, our forces at the Material Yard in Roanoke, Virginia, who are supervised by Supervisor C. F. Dowdy are preparing to weld some rail. We have furloughed employes with sufficient skills to do this work. Their names are listed on Attachment 'A', hereto. These men have been deprived of a job opportunity by the transferring of this work to a contractor at Bellvue, [sic] Ohio. We have been advised that there has been a new welding line installed at Bellvue, [sic] Ohio, since our men were furloughed from the Roadway Material Yard. As previously stated, we were welding rail on two shifts in 1977.

Therefore, in view of the above, consider this as a claim for the employes listed in Attachment 'A', who are furloughed or cut back, be paid an equal proportionate amount of man hours consumed by the outside forces performing this work. This is to be considered as a running claim and retroactive sixty (60) days from the date of this letter, and to be considered as a claim for any work as described above that is done in the future.

We are citing Rules 1, 2 and Appendix 'D', of the current M/W Agreement, and any other Rule which might pertain to the above in support of this claim."

Carrier's response thereto, in part pertinent here, read:

"Initially, your claim is declined because of lack of specificity and because of being vague and ambiguous in that you allege transfer of work from Roanoke to Bellevue, but have offered no probative evidence to support you claim. We can understand the reason you have not offered support for your contention, because, in fact, there has been no transfer of work from Roanoke to Bellevue as you allege. As you know, basically, rail welding at Roanoke plant is by oxycetylene process and for a number of years rail has also been welded at the Bellevue facility which, you may not be aware of, uses a more modern updated process of electric flash butt-welding.

In the current year because of a number of economic facts, tied in part to the net loss of revenue as a result of the recent coal miners' strike of about $12.7 million for the first quarter of 1978, the Company simply will not lay as much rail in 1978 as in 1977. Thus, there will be considerably less need for welded rail. For example, in 1977 the Bellevue facility made 103,141 welds and is estimated 68,108 will be made in 1978. In contrast, the Roanoke facility only made 16,994 welds in 1977, and is estimated will make about 450 in 1978. Clearly, there has been no work

transferred or contracted out from Roanoke to Bellevue. There has simply been considerable less demand for welding work.

You have not identified the exact work that you allege has been transferred or contracted from the Roanoke facility. Certainly there has been no rail loaded up at Roanoke facility and shipped to Bellevue. We take vigorous exception to your contention that rail welding has been only performed exclusively and historically and traditionally at the Roanoke Roadway Material Yard. The Bellevue facility has been welding rail for some nine years or so without any complaint and with considerably more welds than Roanoke. For example, in 1972, Roanoke only made 1,618 welds while Bellevue made 54,449, almost 34 times more than Roanoke. This is not an isolated instance as in 1973, 3,654 welds were made in Roanoke vs. 70,402 in Bellevue, etc.

While we do not disagree with your contention that two shifts were worked in Roanoke in 1977, it only confirms our position that even then only 16,994 welds were made which was far below the 103,141 welds made in Bellevue and indicates, for one thing, how inadequate the Roanoke facility is and has been. Therefore, there is no substance to your contention that only Roanoke has and can weld rail.

We do not understand your claim for furloughed people claimed on your Attachment 'A', as you have not shouldered your burden of proof of the alleged work to which these employees are entitled. Certainly this 'claim' cannot be considered a 'running claim' as it does not meet the very basic criteria for such. Nor does your 'claim' for '** any work ** that is done in the future' meet the criteria for a bona fide claim in that it is vague and ambiguous, does not specify where, when, why, by whom, etc. 'claim' is made.

Rule 1 does not support your claim of alleged transfer or contract of work nor does Rule 2 which is simply seniority groups. Therefore, there has been no violation of either of these two rules you rely upon. Furthermore, Appendix 'D', upon which you rely, has not been violated. The very same work which has been performed at Bellevue for over nine years is still being performed there and you have not supported your contention that some work of some description was moved or contracted from Roanoke to Bellevue. We, in turn, have shown there has been merely a reduction in the need for welded rail.

Your claim is not supported by the rules of the current agreement and is, therefore, declined."

Carrier maintains a facility in Roanoke, VA wherein a 'Roadway Material Yard' is maintained for the purpose of storing, grading, constructing and refurbishing all types of railroad track materials. Oxy-acetylene welding equipment is located therein for welding rail. Such process involves welding lengths of rail into a continuous 'ribbon' of over 1000 feet in length for eventual track installation.

When said facility is in operation it employs one foreman, four utility mechanics, six utility helpers and three laborers. The Employees in said material yard are covered under the scope of the M/W Employees Agreement, effective January 1, 1975.

Also, a major terminal facility and division headquarters point is located at Bellevue, Ohio, on property acquired in the merger of the Norfolk and Western Railroad and the former Nickel Plate Railroad in the early 1960's.

When it became apparent that continuous welded rail was a practical and efficient replacement for the then standard jointed rail, Carrier arranged with the Chemtron Corporation for the construction and operation of a sophisticated, highly automated, electronic rail welding plant at Bellevue, Ohio, because of its central location on Carrier's system. This new plant was completed and began production in 1969 over 11 years ago. The plant is maintained and operated by both Chemtron employees and Maintenance of Way employees who are represented by the Nickel Plate-Wheeling and Lake Erie Federation of the BMWE under the schedule agreement effective February 1, 1951.

It was not denied that there was virtually no objection throughout the years to the operation of the Bellevue plant by either of the Maintenance of Way committees representing the NKP-WLE Federation or the NW System Federation.

The Board, on this record, must find that the claim must fall for the lack of proof. The burden for developing and proving a claim lies with the moving party. Carrier is not required, nor is the Board permitted, to make the case for the petitioner. As pointed out in Third Division Award 19960 (Lieberman):

> "Initially in this matter the carrier contends that the claim as presented on the property

was too vague and indefinite and hence defective: Carrier persisted in this position from the outset and throughout the handling of this claim. Carrier states that the letter of July 17, 1971 presenting the claim alleges that certain unspecified duties of a blank position were performed by the incumbent of an accepted position. Nowhere in the handling of this claim on the property were there any data furnished as to how claimant's were effected, what duties were performed improperly, when they were performed, or two claimants could each have a claim involving one position.....

Carrier's position with respect to the deficiency of the claim is well taken. The Board has held in numerous Awards that the burden of establishing all the essential elements of the claim must be met by the Petitioner. In Award 16675 we said:

'...the awards eminating from this Board establishing the principle that claims must be specific and that carrier is under no obligation to develop the claim for the petitioner are too numerous to mention. Suffice it to say, that the principle is well established and not subject to dispute. The burden is on the petitioner to present facts sufficiently specific to constitute a valid claim. The vagueness and indefiniteness of the instant claim is therefor fatal and renders a proper adjudication of the merits if possible.

We will dismiss the claim.'

In this case also, we must dismiss the claim."

Likewise, as noted by Third Division Award 13741 (Dorsey):

"It is axiomatic that: (1) the parties to an agreement are conclusively presumed to have knowledge of its terms; (2) a party claiming a violation has the burden of proof.

When the respondent denies a general allegation that the agreement has been violated for the given reason that it is not aware of any rule that supports the alleged violation, the movant, in the perfection of its case on the property, is put to supply in specifics. It is too late to supply the specifics for the first time, in the Submission to this Board -this because:

(1) it in effect raises new issues not the subject of conference on the property; and (2) it is the intent of the act that issues in the dispute, before this Board, shall have been framed by the parties in conference on the property.

Upon the record, as made upon the property, we are unable to adjudicate the merits of the alleged violation. We will dismiss the claim."

Here, two issues were raised by the Employees, to wit- first that work had been transfered from the Roanoke facility to the Bellevue facility. Such issue was initiated on the premise that the employment level declined at Roanoke. Second, it was argued that the employees at Roanoke were capable of doing the same work as the employees at Bellevue.

However, there was no showing made in the instant case of what work was transferred, or what particular work the employees at Roanoke had entitlement to. Nor, was it shown what rule specifically provided the basis for the alleged contractual exclusive entitlement, on behalf of the Roanoke employees.

The Board concludes that because the Bellevue welding plant has been in operation since 1969, that said plant put a second shift on after an additional welding machine was installed in September 1976, such facts reflect the absence of any relevance between the existence of the Bellevue, Ohio, Plant and the reduction of the work at the Roanoke, VA, Plant. The continuance of a lengthy silence, until this case, concerning the installation and operation of the Bellevue facility by the Employees supports the conclusion above, as well as the conclusion that if they had any rights, they slept on same.

Therefore, the Board, on the record before it, finds that a denial here will serve as well as a dismissal.

Award: Claim denied.

A. D. Arnett, Employee Member

G. C. Edwards, Carrier Member

Arthur T. Van Wart, Chairman
and Neutral Member

Issued at Salem, New Jersey, September 30, 1980.